Office Supreme Court, U.S.
FILED
APR 3 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 978

RICHARD SYLVIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PAUL T. SMITH
MANUEL KATZ
209 Washington St.
Boston 8, Massachusetts
Attorneys for Petitioner

Blanchard Printing Company, Boston, Mass — Law Printers

TABLE OF CONTENTS

Subject Index

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	8
Appendix A	9
Opinion Below	9
Judgment Below	12

Table of Citations

Cases

A. M. Spring Drug Co. v. *United States*, 12 F.2d 852	7
Carlton v. *United States*, 198 F.2d 795	7
Crisp v. *United States*, 262 F.2d 68	5
Eastman v. *United States*, 212 F.2d 320	5
Gorin v. *United States*, 1 Cir., 1963, Nos. 5997-5999	7
Hansford v. *United States*, 303 F.2d 219	5
Heath v. *United States*, 169 F.2d 1007	7
Henderson v. *United States*, 261 F.2d 909	7
Henderson v. *United States*, 237 F.2d 169	6
Kivette v. *United States*, 230 F.2d 749	7
Klosterman v. *United States*, 248 F.2d 191	7
Marbs v. *United States*, 250 F.2d 514	7
Masciale v. *United States*, 236 F.2d 601, 356 U.S. 386	7
Mitchell v. *United States*, 143 F.2d 953	7
Rodriquez v. *United States*, 227 F.2d 912	5
Sherman v. *United States*, 356 U.S. 369	6

Page

Sorrells v. *United States*, 287 U.S. 435 6
United States v. *Di Donna*, 276 F.2d 956 5
United States v. *Landry*, 257 F.2d 425 7
United States v. *Sherman*, 200 F.2d 880 6
United States v. *Sherman*, 240 F.2d 949 7
Washington v. *United States*, 275 F.2d 687 7

Statutes

21 U.S.C. s. 174 3
26 U.S.C. s. 4705 (a) 3
28 U.S.C. s. 1254 (1) 2

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No.

RICHARD SYLVIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Richard Sylvia, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on January 22, 1963.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 9, is not as yet reported.

Jurisdiction

The judgment of the court below was entered on January 22, 1963. It is set forth on page 79 of the certified copy of Record Appendices and Proceedings in the court below, filed with this petition, and is also printed in Appendix A hereto, *infra*, p. 12. A petition for rehearing was filed January 29, 1963 (R.A.[1] 80-84.). Rehearing was denied on March 7, 1963. (R.A. 84.) The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. Is it fatally inconsistent for a defendant to take the stand and deny the commission of the crime charged and then assert his right to an instruction on the issue of entrapment?

II. Is it error for a trial judge to charge a jury that the burden of proving entrapment is on the defendant, without qualifying that statement in any way?

Constitutional and Statutory Provisions Involved

There are no constitutional or statutory provisions involved in this case.

Statement of the Case

On April 27, 1961, a four-count indictment was returned by a District of Massachusetts grand jury against petitioner charging him with offenses involving heroin, a narcotic drug. Counts one and two, although describing separate crimes, related to the same events which were alleged

[1] "R.A." refers to the certified copy of the Record Appendices and Proceedings in the court below.

to have occurred in Boston on November 24, 1960. Count one accused petitioner of selling, bartering, exchanging and giving away forty milligrams of heroin, without receiving a written order therefor, in violation of 26 U.S.C. s. 4705(a). Count two alleged that petitioner received, concealed, bought, sold and facilitated the transportation, concealment and sale of forty milligrams of heroin, knowing it to have been illegally imported into the United States, in violation of 21 U.S.C. s. 174. Counts three and four related to a single transaction which was averred to have taken place in Boston on November 25, 1960. Except for the date and quantity, count three was exactly like count one and count four was the same as count two. (R.[2] 2-3)

On May 1, 1961, petitioner pleaded not guilty.

The government's evidence warranted a finding that petitioner was approached by one Gibson, a government agent, and asked if he knew where a certain individual, Chandler, could be found. Petitioner stated that he did not know, but asked if he could help him. Gibson replied that he was interested in a "$5 bag." Petitioner replied that he could help him, and upon receipt of $5, produced a small paper bag from his pocket and gave it to Gibson. A conversation ensued indicating that petitioner knew the contents to be heroin, which, in fact, it proved to be. A similar transaction was repeated the following day. (Appendix A hereto, *infra*, p. 10.)

In his defense petitioner took the stand and testified that he met Gibson in a cafe; that Gibson asked him to go to a street corner and meet a man with a goatee and pick up two packages; that he did so; that Gibson reimbursed him for what he paid for the packages and that he delivered the packages to Gibson; that he did this as a favor to Gibson

[2] "R." refers to Record Appendix to Brief for Appellant filed in the court below.

and without knowledge of what was in them. (Appendix A hereto, *infra*, p. 10.)

There was also evidence that Gibson had been introduced to petitioner by one Hayes, a former addict who now was an infgrmer paid by the Bureau of Narcotics to turn in peddlars of narcotics; and that prior to the sales, none of the government agents had any cause to believe that petitioner dealt in narcotics. (R. 33-35, 39-41, 59-60.)

At the close of the evidence and after argument of counsel, the trial judge instructed the jury, among other subjects, on the law of entrapment and its applicability to the case, and then charged the jury:

> "It's all a question of fact. The defendant who raises the defense of entrapment has the burden of proving entrapment. But the government has the burdent of proving beyond a reasonable doubt every other element of crime." (R. 24.)

Immediately after the conclusion of the charge, counsel for petitioner objected, saying:

> "I think the law is fairly clear that the burden of going forward is on the defendant, but the burden of proof is upon the Government. That is why I made the opening that I made: To put the Government on notice. I think the Government has the burden of proof.
>
> "It's like raising the question of insanity. You have the burden of going forward, and I think the burden of proof is upon the Government." (R. 24-25.)

Thereupon, the trial judge instructed the jury:

> "If there is any doubt about the matter, I want to make it quite clear that a person prosecuted for an

offense shall be acquitted if he proves that his conduct occurred in response to an entrapment.

"That is my instruction to you." (R. 25)

To that additional instruction, counsel for petitioner also objected.

Petitioner was found guilty on all four counts. He was sentenced to be imprisoned for a period of five years. The sentence was stayed pending appeal and petitioner filed seasonable notice of his appeal to the court below.

The court below affirmed the judgment of the district court, holding that the case fell "under the settled principle that a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment;" that the district judge "should not have charged on entrapment at all;" that even if "the charge was legally inaccurate as well, . . . the defendant was (not) harmed;" and that "it cannot be prejudicial to permit him an extra defense." (Appendix A hereto, *infra*, p.)

Petitioner seasonably filed a petition for rehearing which as indicated was denied by the court below. (R.A. 80-84.)

The court below stayed its mandate.

Reasons for Granting the Writ

I.

The decision of the court below in the case at bar and in *United States* v. *Di Donna*, 2 Cir., 1960, 276 F.2d 956; *Rodriguez* v. *United States*, 5 Cir., 1955, 227 F.2d 912; *Eastman* v. *United States*, 9 Cir., 1954, 212 F.2d 320, upon the authority of which the instant case was decided, are directly in conflict with the decisions of *Hansford* v. *United States*, D.C. Cir., 1962, 303 F.2d 219, 221; *Crisp* v. *United*

States, 4 Cir., 1958, 262 F.2d 68, 70; and *Henderson* v. *United States*, 5 Cir., 1956, 237 F.2d 169, 173.

Moreover, the majority in *Sorrells* v. *United States*, 1932, 287 U.S. 435, 452; 53 S.Ct. 211, 216, and the minority in *Sherman* v. *United States*, 1958, 356 U.S. 369, 380, 78 S.Ct. 819, 824, both emphasized that entrapment lies in favor of a defendant, because "the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." Such a reason, it seems to petitioner, has nothing to do with the question of whether the accused admits or denies from the witness stand his involvement in the crime.

It would appear that the decisions of the Courts of Appeals for the District of Columbia and for the Fourth and Fifth Circuits are correct and that entrapment should be as available to a defendant who denies his guilt not only by his plea, but also by his testimony, as it is to an accused who denies his guilt merely by his plea.

The first question presented is undoubtedly of importance to the administration of the criminal law in the federal courts and the conflict should be resolved.

II.

No Court of Appeals has ever held, as charged by the district judge in the case at bar, that a defendant has the burden of proving entrapment. Although there are serious differences among the various Courts of Appeals as to what the Government is required to prove, they are in complete agreement that at least some part of the burden is on the Government.

Some cases seem to place the burden of proving the inducement on the defendant and of proving the defendant's prior disposition or criminal design on the Government. *United States* v. *Sherman*, 2 Cir., 1952, 200 F.2d 880,

—882, 883; *United States* v. *Sherman*, 2 Cir., 1957, 240 F.2d 949, 951, reversed on other grounds, 1958, 356 U.S. 369; *Masciale* v. *United States*, 2 Cir., 1956, 236 F.2d 601, affirmed, 1958, 356 U.S. 386; *Kivette* v. *United States*, 5 Cir., 1956, 230 F.2d 749, 754. This is now the rule in the First Circuit where the Court of Appeals has just defined the *quantum* of proof resting on the defendant to be "proof by a preponderance of the evidence". *Gorin* v. *United States*, 1 Cir., 1963, Nos. 5997-5999. Other Courts of Appeals seem to place the entire burden of proof upon the Government. These others require the Government to prove beyond a reasonable doubt that it did not induce the defendant to commit the crimes charged and, if there is evidence of inducement, either that the defendant had a prior disposition to commit the offense or that the Government had reasonable grounds to believe that the defendant was engaging in unlawful activities of the kind charged. *Washington* v. *United States*, 5 Cir., 1960, 275 F.2d 687, 689; *United States* v. *Landry*, 7 Cir., 1958, 257 F.2d 425, 429; *A. M. Spring Drug Co.* v. *United States*, 8 Cir., 1926, 12 F.2d 852, 856; *Marks* v. *United States*, C.A. 8, 1957, 250 F.2d 514, 516-518; *Carlton* v. *United States*, 9 Cir., 1952, 198 F.2d 795, 798; *Mitchell* v. *United States*, 10 Cir., 1944, 143 F.2d 953, 957. Still other cases seem to say that when there is evidence of inducement, the Government must prove a prior disposition and good cause for ensnaring the defendant. *Klosterman* v. *United States*, 3 Cir., 1957, 248 F.2d 191, 196; *Henderson* v. *United States*, 5 Cir., 1959, 261 F.2d 909, 910-911; *Heath* v. *United States*, 10 Cir., 1948, 169 F.2d 1007, 1010.

But whatever view is followed, every case dealing with or touching upon the burden of proof issue—and there are cases from the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth Circuits—has placed some part of the

burden of proof on the issue of entrapment on the Government.

It seems to petitioner that the issues dealing with the burden of proof, including the *quantum* of proof required if the burden of proving any part of the issue is placed on the defendant, are of great importance in the proper administration of criminal law in the federal courts and should be resolved definitively by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL T. SMITH
MANUEL KATZ
209 Washington St.
Boston 8, Massachusetts
Attorneys for Petitioner

Appendix A

United States Court of Appeals
For the First Circuit

No. 6021.

RICHARD SYLVIA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Manuel Katz, with whom *Paul T. Smith* and *Raymond J. Donat* were on brief, for appellant.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

January 22, 1963.

ALDRICH, *Circuit Judge*. Sylvia was found guilty by a jury of violating 26 U.S.C. §4705(a) and 21 U.S.C. §174 in connection with the sale of a small quantity of heroin. He appeals, not on the ground that the evidence was insufficient to support a conviction, but because the court placed upon him the burden of proving the defense of entrapment.

The government's evidence warranted a finding that Sylvia was approached by one Gibson, a government agent, and asked if he knew where a certain individual, Chandler,

could be found. Sylvia stated that he did not know, but asked if he could help him. Gibson replied that he was interested in a "$5 bag." Sylvia replied that he could help him, and upon receipt of $5, produced a small paper bag from his pocket and gave it to Gibson. A conversation ensued indicating that Sylvia knew the contents to be heroin, which, in fact, it proved to be. A similar transaction was repeated the following day. On this evidence, of course, a conviction was warranted and there was no issue of entrapment. See *Masciale* v. *United States*, 1958, 356 U.S. 386, 388; *Sandoval* v. *United States*, 10 Cir., 1960, 285 F.2d 803.

In his defense Sylvia took the stand and testified that he met Gibson in a cafe; that Gibson asked him to go to a street corner and meet a man with a goatee and pick up two packages; that he did so; that Gibson reimbursed him for what he paid for the packages and that he delivered the packages to Gibson; that he did this as a favor to Gibson and without knowledge of what was in them. This testimony, he asserts, warrants a finding of entrapment. We hold it did not, at least in view of the other instructions given to the jury, to the effect that if the government had failed to establish beyond a reasonable doubt that Sylvia knew there was heroin in the packages he did not have "possession" and could not be convicted. The defendant's testimony was to a single, indivisible episode, and was either to be accepted or rejected in its entirety.* The jury's verdict of guilty necessarily indicated its rejection. There was no basis left, in other words, for a finding of

---

*While a jury normally may accept a witness' testimony in part and reject it in part, there comes a point where "fragmentation" becomes illogical. *Beradi* v. *Menicks*, 1960, 340 Mass. 396, 400; see *Hannon* v. *Hayes-Bickford Lunch System, Inc.*, 1957, 336 Mass. 268, 273. We think this is such a case. If Sylvia's testimony about not knowing what was in the packages is not credited, his whole story of deception amounting to entrapment collapses.

entrapment. This case falls under the settled principle that a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment. *United States* v. *Di Donna*, 2 Cir., 1960, 276 F.2d 956; *Rodriguez* v. *United States*, 5 Cir., 1955, 227 F.2d 912; *Eastman* v. *United States*, 9 Cir., 1954, 212 F.2d 320.

The court should not have charged on entrapment at all. Even if, which we need not determine, the charge was legally inaccurate as well, we cannot see that the defendant was harmed. It cannot be prejudicial to permit him an extra defense. *Cf. Samson* v. *United States*, 1 Cir., 1928, 26 F.2d 769.

Judgment will be entered affirming the judgment of the District Court.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6021.

RICHARD SYLVIA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

JUDGMENT

January 22, 1963.

This cause came on to be heard on appeal from the *United States District Court for the District of Massachusetts*, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD,

Clerk.

[cc: Messrs. Katz and Koen.]

Supreme Court, U.S.
FILED
MAY 3 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

RICHARD STARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI DENIED

ARCHIBALD COX,
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
Department of Justice,
Washington, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5

CITATIONS

Cases:

Gorin v. *United States*, 313 F. 2d 641	5, 6
Hansford v. *United States*, 303 F. 2d 219	6
Lopez v. *United States*, No. 236, this Term	8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 978

RICHARD SYLVIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-11) is reported at 312 F. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1963. A petition for rehearing was denied on March 7, 1963. The petition for a writ of certiorari was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the particular circumstances of this case, the judge's charge that the burden of proving entrapment is on the defendant, requires reversal of the conviction.

STATEMENT

Petitioner was convicted in the United States District Court for Massachusetts on four counts charging sales of heroin on two occasions and was sentenced to imprisonment for five years.

The government's evidence showed that on November 24, 1960, an undercover agent met petitioner outside a cafe, and asked petitioner if he knew where Deke was (R. 27-28). The agent had met petitioner at the cafe the night before when the agent was with Deke and had told petitioner he was having trouble getting narcotics (R. 38, 42, 47). Petitioner said that he did not know Deke's whereabouts, but that he would be glad to help (R. 27-28). The agent said he was interested in a $5.00 bag. Petitioner then sold the agent for $5.00 a bag which proved to contain heroin (R. 5-6, 28). The next night, at the cafe, petitioner told the agents he had two bags left. The agent bought for $5.00 another bag which also was shown to contain heroin (R. 30).

Petitioner testified that on the evening of November 23, he was having a drink with Denis Chandler (Deke) when a man named "Whizzer", who was with the agent, called Chandler over. Thereafter Chandler went out. Whizzer asked petitioner whether he had $8.00 and would do him a favor and pick

up two packages for $8.00 from a man down the street. Petitioner did so. On his return, Whizzer told petitioner to give the agent one package for which the agent gave petitioner $5.00 (R. 58-60).[1] The next evening, at the cafe, petitioner asked Whizzer what to do with the other package and was told to give it to the agent. The agent gave him $5.00 (R. 63-64).

The judge charged the jury *inter alia* that if petitioner "did not know what he was disposing of, if he disposed of something, then of course he could not be found knowingly to have sold heroin" (R. 70).

As to the defense of entrapment, which petitioner's counsel had raised in his opening statement (see R. 72), the court charged, *inter alia* (R. 72-73):

> If a public official creates a crime which would never have occurred in any way except because of his actions, under those circumstances you look to see whether the defendant was entrapped.
>
> * * * *
>
> To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. That is, you look to see whether the man is disposed to commit a crime. There are many ways of determining whether he is prepared to commit a crime. Because he is in a business which is criminal—that is one indication. Another indication is if he has previously engaged in similar offenses. But a third kind

[1] Petitioner testified that this occurred in the cafe (R. 60) and not, as the agent had testified, in front of a luncheonette (R. 28, 43-44).

of evidence is if he shows a readiness to initiate the conduct himself.

After discussing the evidence the judge said (R. 73):

> But the question you have to address yourself to is this: Did this transaction originate in the mind of Gibson? Did he induce a well disposed person to commit a wrong that he never would have committed?
>
> Or, on the contrary, was the situation one in which a person who had the willingness to engage in crime either made the first approach or, if you please, readily responded the moment the suggestion was made to him?
>
> It's all a question of fact: The defendant who raises the defense of entrapment has the burden of proving entrapment. But the Government has the burden of proving beyond a reasonable doubt every other element of crime.

Petitioner's counsel objected to the instruction on the burden of proving entrapment (R. 74). Thereafter the judge told the jury (R. 74):

> I want to make it quite clear that a person prosecuted for an offense shall be acquitted if he proves that his conduct occurred in response to an entrapment.

The court of appeals held that it need not determine whether the judge's charge was legally accurate[*]

---

[*] Subsequent to the decision in this case the First Circuit held that it is correct to charge that the burden of proving inducement by a preponderance of the evidence is on a defendant and that the government then has the burden of proving beyond a reasonable doubt that the defendant was ready and willing to commit the offense at a propitious opportunity. The court found error in the failure of the trial judge af-

since there was no basis in the evidence for a charge of entrapment.

The court held that on the government's evidence, there was no issue of entrapment and that petitioner's testimony raised no such issue in view of the instructions that petitioner could not be found guilty unless he knew the package contained heroin. It pointed out that if petitioner's claim of not knowing the contents of the package was not credited, his whole story of deception amounting to entrapment collapsed. It stated that "a defendant's testimony to the effect that he did not commit the crime cannot raise an issue of entrapment."

ARGUMENT

It is true, as petitioner asserts, that there is considerable confusion and disagreement in the courts of appeals as to whether, with relation to the defense of entrapment, the instructions of the trial judge should deal with the burden of proof on that specific issue and, if so, what the proper charge as to the burden of proof should be. Nevertheless, we do not think that this is an appropriate case in which to consider that question, for, with the court of appeals, we do not believe that any issue of entrapment was in fact presented by this record.

Petitioner, we believe, misreads the opinion below as holding that the defense of entrapment is not

---

firmatively to instruct the jury that the defendant's burden of persuasion was only by a preponderance of the evidence. *Gorin* v. *United States*, 313 F.2d 611, decided February 20, 1963.

available to one who denies the commission of the offense. The decision holds only that "a defendant's testimony to the effect that he did not commit the crime *cannot raise an issue of entrapment*." This is not inconsistent with the principle of the cases cited by petitioner as in conflict with the ruling below, such as *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C.), where the District of Columbia Circuit held that it was "consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment." In other words if anything in the evidence indicates entrapment, that issue must be submitted to the jury, but a defendant cannot claim that his own evidence raises an issue of entrapment when he himself denies that the offense ever occurred.

In this case, nothing in the evidence for either side raised an issue of entrapment. The government's evidence was that the agent did not even suggest that

---

In its later opinion in *Gorin* v. *United States*, the court below said (313 F.2d at 634, n. 10): "It is inconsistent for an accused to take the stand and deny the commission of the crime charged and then assert his right to a charge on the defense of entrapment. See *Sylvia* v. *United States*, 1 Cir., 312 F.2d 145. However, where there is evidence of governmental inducement, it is not fatally inconsistent for an accused to keep silent in the hope that the jury will not find that the government has proved its case beyond a reasonable doubt, but ask that the jury be charged on the defense of entrapment if it should find the commission of the allegedly criminal acts. The law allows this much inconsistency. See *Henderson* v. *United States*, 237 F. 2d 169, 172-173 (C.A. 5, 1956)."

petitioner sell him narcotics, that petitioner on his own offered to help when the agent asked whether petitioner knew where Dole was. The agent testified at the trial that he did not know that petitioner was selling narcotics and did not want to buy from him because he had never found a seller of narcotics to be so overt (R. 46-47). Certainly the prosecution witnesses suggested no issue of entrapment. Nor did petitioner. Although he labelled his defense "entrapment", it was not entrapment in the legal sense, but a denial of any willful action. Petitioner's defense was that he obtained two packages as a favor to "Whizzer" and delivered them to the agent for Whizzer without knowing what was in them. If the jury believed petitioner, they had to acquit. The judge instructed the jury to decide first whether there had in fact been a sale and specifically charged that, if petitioner did not know what he was disposing of, he could not be found knowingly to have sold heroin (R. 70). Since it was perfectly clear from the judge's charge that the burden was on the government to prove a sale beyond a reasonable doubt, the jury had to reject petitioner's testimony and accept the agent's as proving a sale beyond a reasonable doubt. As the court of appeals pointed out, if petitioner's "testimony about not knowing what was in the packages is not credited, his whole story of deception amounting to entrapment collapses." The consequence is that the error, if any, in the entrapment charge was harmless. Petitioner received more than his due.

Under these circumstances, we believe that the petition for a writ of certiorari may properly be

denied. However, since the questions presented here with respect to entrapment are similar to those before this Court in *Lopez* v. *United States*, No. 236, this Term, the Court may wish to defer action on this petition until after its decision in *Lopez*.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MAY 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963 O 684707